

## Breach of Construction Contract

You put your dream home in the hands of a supposedly competent, reliable contractor; yet they betray this trust with manifestly sloppy work and gross, inexcusable delay. Read on to find out what your options are and how we may help.

### When Your Builder Commits Breach of Contract

Have you experienced these when building or renovating your home?:

- your contractor used inferior materials
- some materials were different from the ones agreed upon
- some of the works were left half-finished
- constant and unreasonable delays
- the overall quality of work was strikingly substandard
- you received invoices for the delayed, incomplete, shoddy work
- you keep reaching out to your contractor via calls, texts, e-mails - to no avail

If yes, know that you don't need to suffer. Know your rights and your options when your construction contract is breached.

### How Do I Know If There's Been Breach?

Let's look at what constitutes breach, and the kinds of contracts it affects.

#### What constitutes a breach?

A breach happens when one party violates any of the agreements embodied in the contract, or when one party "repudiates" the contract. What do we mean by "violation" and "repudiation"?

Violation means "going against." In the example above, the contractor, by his actions, violated the agreements in their contract.

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Repudiation means that one party evinces an intention to no longer be bound by the terms of the contract; or that they are unable to perform the obligations under the contract. In short, when one party refuses (or becomes unable) to perform his obligations under the contract, there is repudiation. An example would be abandonment of the project.

## What are the kinds of contracts it affects?

Construction contracts may either be standard form, or drawn up by the contractor from scratch. Standard forms are the more commonly used contracts. These are the pre-printed forms that just need to be filled in by the parties, and which are available through Australia's construction industry associations like Master Builders and Housing Industry Association, and through the NSW Fair Trading.

Now, depending on the type and extent of breach, but regardless of the type of contract, if your rights have been breached, you have the following options:

1. Sue for Damages ; or
2. Terminate the Contract

### A. Damages

This remedy entitles you to an amount of money from the erring contractor, to compensate you for your loss. The amount is variable; you could claim, among others, actual damages, which requires proof of actual loss, and is computed to reflect the same; or you could claim liquidated damages, if the construction contract contains a clause providing for the same.

#### PROS

- If successful, entitles you to a sum of money
- It's commonly resorted to

#### CONS

- It must be filed in court
- Proceedings could be a burden in terms of time, money, energy
- Involves costly litigation fees
- Actual damages requires proof of actual loss, and must be computed to reflect the same

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## B. Termination of the Contract

Another option is to terminate the contract. The availability of this remedy is dependent on several factors. What are these?

1. There was a breach of an essential term; or
2. There was breach of an innominate term, where the effect of the breach has serious consequences; or
3. The erring party repudiated the contract; or
4. When a party has a right to terminate under the contract.

Now, a party's right to terminate may be either:

- A. Written into the contract, as in number 4; or
- B. Even without a written clause allowing a party to terminate, they may still do so on the basis of numbers 1-3.

Let us explain further.

- An "essential term" is the backbone of the agreement; without which, there will be no contract.
- An "innominate" term is not essential, but the violation of which nevertheless has serious consequences, and is considered to be a serious breach or a repudiation.

Repudiation," as previously explained, means a party is no longer willing or able to proceed with the contract, or to perform his obligations under the contract.

- A contract may also provide the parties a right to terminate when there is "material breach," without there necessarily being a repudiation by either party.

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### PROS

- The most commonly resorted to remedy in case of breach
- Does not necessarily involve the courts
- Simply requires serving a **Notice of Breach and/or a Show Cause Notice**

### CONS

- It must be filed in court
- Proceedings could be a burden in terms of time, money, energy
- Involves costly litigation fees
- Actual damages requires proof of actual loss, and must be computed to reflect the same

## Which of These is Right for You

So now you know the most common remedies provided by law (Home Building Act 1989 (NSW)). The next question is, which of those options should you take?

Offhand, what we could offer are practical solutions:



First, you may want to reach out to your contractor and talk things out, settle things amicably.



If that initial step had been exhausted, and you've pulled out all stops, but you're still ignored and left on read, the next practical step would be to call a professional whose training and expertise will help you make an intelligent decision. In this instance, a lawyer specialising in construction law would be your best bet.

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## Your Options, Moving Forward



You can do independent research and decide on your own what course of action to take; or



You can call and consult with a lawyer, preferably one who specialises in construction law, who can and will help you make an informed decision; and will draft all the required documents for you, such as a Notice of Breach or a Show Cause Notice, should you opt for termination of contract.

Of course, all details and factual circumstances must be taken into consideration in deciding what the best course of action is for your particular situation. Decisions are made on a case-to-case basis.

Contracts Specialist offers advisory opinion as well as a full range of services relating to the vindication of your rights, whether you choose to pursue an action in, or out, of court.

Don't let your rights be trampled upon. Call us. Your first consult is on us.

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